

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON**

**STATE OF WEST VIRGINIA,**

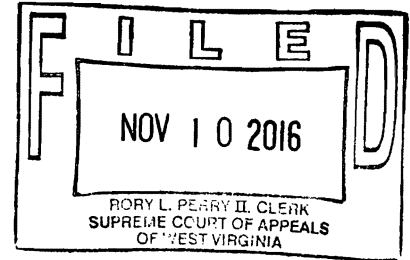
**Plaintiff/Appellant,**

**v.**

**NO: 16-0543**

**STEWARD BUTLER,**

**Defendant/Appellee**



**RESPONSE BRIEF OF THE APPELLEE STEWARD BUTLER**

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## **ASSIGNMENTS OF ERROR**

### **I.**

**IT WAS ERROR FOR THE CIRCUIT COURT TO FIND THAT WEST VIRGINIA CODE 61-6-21(b) DOES NOT PROVIDE PROTECTION OF AN INDIVIDUAL'S CIVIL RIGHTS WHERE THE VIOLATIVE ACT IS BASED SOLELY UPON SAID INDIVIDUAL'S SEXUAL ORIENTATION.**

### **II.**

**IT WAS ERROR FOR THE CIRCUIT COURT TO ORDER COUNTS I AND II OF INDICTMENT NUMBER 15-F-242 DISMISSED BECAUSE, REGARDLESS OF THE COURT'S ANSWER TO THE CERTIFIED QUESTION, THE STATE MAY STILL PROSECUTE THE DEFENDANT UNDER W.VA. CODE 61-6-21 FOR A VIOLATIVE ACT BECAUSE OF THE SEX OF HIS VICTIMS.**

## **STATEMENT OF THE CASE**

The case before the court arises from an alleged incident occurring on or about 05 April 2015 in Huntington, Cabell County, West Virginia.

The State of West Virginia alleges that on the date aforesaid the defendant, Steward Butler, a former Marshall University football player, while riding as a guest passenger in a motor vehicle observed two male individuals engage in a kiss. It is further alleged that Mr. Butler then exited his vehicle, approached the individuals in question, made a homophobic slur and then physically struck each individual.

Mr. Butler originally was charged in the Magistrate Court of Cabell County with two (2) counts of misdemeanor Battery. The foregoing charges were dismissed, upon motion of the State of West Virginia, on or about 15 June 2015 due to the fact Mr. Butler had been Indicted by the Cabell County Grand Jury. Mr. Butler was Indicted on two (2) counts of Battery and two counts of Prohibiting Violations of an Individual's Civil Rights in violation of West Virginia Code 61-6-21(b). The State of West Virginia has taken the position that Mr. Butler engaged in his alleged conduct due to the alleged victims "sexual orientation."

The defendant indicated, following return of the Indictment, his intent to challenge the applicability of West Virginia Code 61-6-21(b) to the case at bar.

A Status Conference was conducted on 29 September 2015 at which time the lower court directed counsel for the State of West Virginia and Mr. Butler to

conference and draft a certified question for submission to and consideration by this Court. The parties have been in agreement, throughout this litigation, that the issue herein is one of first impression.

The parties, thereafter, drafted said certified question and the lower court submitted an Order of Certification to this Court on 16 December 2015. This court issued an Order Denying Certification on 09 February 2016.

As a result of this court's decision, a Status Conference was conducted on 29 February 2016 at which time a Scheduling Order was agreed upon, without objection, regarding the submission of briefs addressing the issue of the applicability of West Virginia Code 61-6-21(b). The aforementioned Order required the respective briefs to be filed by 21 March 2016. The filing deadline was extended, by Agreed Order dated 01 April 2016 to 12 April 2016.

Thereafter, on 14 April 2016 the State of West Virginia filed a Motion To Extend Filing Deadline. The lower court GRANTED said Motion To Extend Filing Deadline by Order entered also on 14 April 2016 and extended the time for filing of briefs to 22 April 2016.

Thereafter, the parties filed their respective briefs and by Order dated 13 May 2016 the lower court ruled that it could not expand the word "sex" to include "sexual orientation," within West Virginia Code 61-6-21(b) and, therefore, the State of West Virginia could not properly bring such action(s) against Mr. Butler. The lower court stayed the imposition of its Order for a period of sixty (60) days to permit the State of West Virginia to appeal its final

Order. The State of West Virginia timely filed its appeal and the issues are now before this Court for disposition.

### **SUMMARY OF ARGUMENT**

In reply to Assignment of Error # 1, the Respondent/Appellee herein contends that the protections embodied in West Virginia Code 61-6-21 do not include sexual orientation. Specifically, the term “sex,” as embodied in the aforementioned statutory provision cannot be expanded to include “sexual orientation.” Accordingly, the lower court properly interpreted and applied the statutory language in West Virginia Code 61-6-21 to the facts at bar.

In reply to Assignment of Error #2, the Respondent/Appellee herein contends that the State of West Virginia has waived its right to object to any procedural error(s) committed by the lower court in seeking certification. The State of West Virginia never objected to the procedure utilized by the lower court and/or its Order, and more significantly, actually agreed to the same. Additionally, the ruling which was made by the lower court was no longer under the purview of a certified question but, rather, should be treated as a ruling pursuant to Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure. As such, this issue is moot.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This is a case of first impression in the State of West Virginia. As such, oral argument is appropriate pursuant to Rule 18(a) of the Rules of Appellate Procedure and pursuant to Rule 20 of the Rules of Appellate Procedure as the issues presented herein are one of first impression in the State of West Virginia

and, therefore, the decisional process would be aided by the presentation of oral arguments.

## **ARGUMENT**

### **THE LOWER COURT PROPERLY INTERPRETED AND APPLIED THE LANGUAGE OF WEST VIRGINIA CODE 61-6-21 BY HOLDING THAT SEXUAL ORIENTATION IS NOT A PROTECTED CLASS PURSUANT TO THE STATUTE**

The issues presented herein are subject to a de novo review by this court. Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, a de novo standard of review is applied. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); Syl. pt. 3, *State v. Vance*, 207 W.Va. 646, 535 S.E.2d 484 (2000); *State v. Paynter*, 206 W.Va. 521, 526 S.E. 2d 43 (1999). Applying this standard of review to the case at bar, the following discussion establishes that the lower court properly interpreted and applied the statutory language of West Virginia Code 61-6-21.

Specifically, a violation of West Virginia Code 61-6-21(b) does not occur based upon an act occurring against an individual(s) if the violative act in question is based upon said individual's sexual orientation.

West Virginia Code 61-6-21(b) provides in relevant part as follows:

“If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate with, or oppress or threaten any other person in the free exercise of enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the Constitution of laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or **sex**, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.” **(Emphasis supplied).**



The case law interpreting this statutory provision is limited. However, this court in the case of State of West Virginia v. Kendra Sulick, 232 W.Va. 717, 753 S.E.2d 875 (2012) considered a challenge to the constitutionality of West Virginia Code 61-6-21(b).

In Sulick, the defendant, a caucasian female, was convicted of three (3) counts of violating the statute based upon certain conduct constituting a violation of the race protection afforded therein. Ms. Sulick challenged her convictions arguing that the statute was void for vagueness. Ms. Sulick also argued the statute provided for a sentence that was disproportionate to the charge(s).

This court held that W.Va. Code 61-6-21(b) (1987) **is not unconstitutionally vague** and does not violate the United States Amendment XIV, or the West Virginia Constitution Article III, Section 10 and, therefore, held the statute to be constitutional. The court held, specifically, in relation to the void for vagueness argument that “the statute is sufficiently definite to give a person of ordinary intelligence fair notice that his or her contemplated conduct is prohibited.” **(Emphasis supplied).**

The State of West Virginia, in seeking a mechanism to charge Mr. Butler with a felony(ies) is attempting circumvent the plain and unambiguous, language of West Virginia Code 61-6-21(b) by arguing that said statutory language, which creates a protection for sex, should be expanded to include sexual orientation.

As the following discussion and corresponding analysis establishes, the State of West Virginia's position is without merit as the legislature, by its specific exclusion of such class, did not intend for West Virginia Code 61-6-21(b) to include sexual orientation.

Statutory construction and interpretation requires the application of various rules.

The primary objective in construing a statute is to ascertain and give effect to the intent of the legislature. Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).

In examining statutory language generally, words are given their common usage, and "courts are not free to read into the language what is not there, but rather should apply the statute as written." *State ex rel. Frazier v. Meadows*, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994).

As stated, the State of West Virginia argues that the legislature, by including a protection based upon sex also intended to extend the same to sexual orientation. The appellee disagrees.

Black's Law Dictionary (10<sup>th</sup> ed., 2014) defines "sex" as "the sum of the peculiarities of structure and function that distinguish a male from a female organism; gender."

Black's Law Dictionary (10<sup>th</sup> ed., 2014) defines sexual orientation as "a person's predisposition or inclination toward sexual activity or behavior with other male **or** females; heterosexuality, homosexuality, or bisexuality."

“A statute is open to construction where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998).

The appellant herein relies heavily, almost exclusively, upon a flawed argument referencing Title VII. By way of summary, Title VII of the Civil Rights Act of 1964 is federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, religion, national origin and religion.

The appellant argues that because this court has relied upon Title VII to interpret state law related to human rights, this court should, by way of extension find West Virginia Code 61-6-21 applicable to the case at bar. As stated, this argument should not be accepted by this court for the following reasons.

First, appellant correctly concedes that discrimination on the basis of sexual orientation has not traditionally been actionable under Title VII. Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4<sup>th</sup> Cir. 1996); Hopkins v. Baltimore Gas & Electric Co., 77 F.3d 745, 751-52 (4<sup>th</sup> Cir. 1996). However, Title VII specifically and without debate prohibits an employer from discriminating against an individual because of sex. 42 U.S.C.2000(e)-2(a)(1).

As such, appellant’s very argument in its utilization of Title VII which was enacted in 1964 acknowledges the existence of two separate and distinct

classes one of which, sex, is entitled to protection and sexual orientation, which is not.

Second, appellant's argument ignores the fact that West Virginia Code 61-6-21 is a penal statute to which specific rules of interpretation, typically favorable to a defendant apply, as opposed to a statute such as Title VII which is remedial in nature.

Penal statutes must be strictly construed against the State and in favor of the defendant. *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970); *State v. Carper*, 342 S.E.2d 277, 280 (1986)(Miller, J.); See also *State v. Hodges*, 305 S.E.2d 278 (1983); *State v. Vandall*, 294 S.E. 2d 177 (1982); *State v. Barnett*, 284 S.E.2d 622 (1981); *State v. Cole*, 160 W.Va. 804, 238 S.E. 849 (1977); *State ex rel. Davis v. Oakley*, 156 W.Va. 154, 191 S.E.2d 610 (1972).

Third, a vast majority of jurisdictions in the United States have enacted so called "hate crime" statutes which include protections, inter alia, based upon mental or physical disability(ies), gender, gender identity, nationality, race, religion and, of course, sexual orientation.

Specific to the case at bar, a plethora of statutory authority exists. A number of jurisdictions, via statutory enactment, protect and/or prohibit conduct based only sexual orientation and do not include sex.

California:

(a) "Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

(6) sexual orientation Cal. Penal Code 422.55(a).

Colorado:

(1) The general assembly hereby finds and declares that it is the right of every person, regardless of race, color, ancestry, religion, national origin, physical or mental disability or sexual orientation to be secure and protected from fear, intimidation, harassment and physical harm caused by the activities of individuals and groups. Colo. Rev. Stat. 18-9-121

Delaware:

(a) Any person who commits, or attempts to commit, any crime as defined by the law of this State, and who intentionally:

(2) selects the victim because of the victim's race, religion, color, disability, sexual orientation, gender identity, national origin or ancestry, shall be guilty of a hate crime. For the purposes of this section, the term "sexual orientation" means heterosexuality, bisexuality or homosexuality.... Del. Code Ann. Tit. 11, Sec. 1304.

Florida:

(1)(a) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection of this commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim. Fla. Stat. Ann Sec. 775.085

Hawaii:

The defendant is a hate crime offender in that:

(6) The defendant is a hate crime offender in that:

(b) The defendant intentionally selected a victim or, in the case of a property crime, the property that was the object of a crime, because of hostility toward the actual or perceived race, religion, disability, ethnicity, national origin, gender identity, or expression, or sexual orientation of any person.

Illinois:

A person commits hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation... of another individual regardless of the existence of any other motivating factor or factors,

he commits assault, **battery**... (Emphasis supplied). Ill. Comp. Laws Ann 5.5-5-3.2

Louisiana:

A. It shall be unlawful for any person, to select the victim of the following offenses against person and property because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry... La. Rev. Stat. Ann. 14-107.2

Maryland:

Because of another's race, color, religious beliefs, sexual orientation, gender, disability, or national origin, or because another is homeless, a person may not:

(1)(i) commit a crime or attempt to commit a crime against that person;  
MD Crim. Law Code 10-307(2013)

Massachusetts:

(a) Whoever commits an assault or a battery upon a person or damages the real or personal property of a person with the intent to intimidate such person because of such person's race, color, religion, national origin, sexual orientation, gender identity.... Mass. Gen. Law. Ch. 265, sec. 39.

Nebraska:

A person in the State of Nebraska has the right to live free from violence, or intimidation by threat of violence, committed against his or her person or the destruction or vandalism or, or intimidation by threat of destruction or vandalism of, his or her property regardless of his or her race, color, religion, ancestry, national origin, gender, sexual orientation, age or disability. Neb. Rev. Stat. Ann., Sec. 28-110 and 111.

New Jersey:

a. Bias Intimidation: A person is guilty of the crime of bias intimidation if he commits, attempts to commits, conspires with another to commit, or threatens the immediate commission of an offense....

(1) with the purpose to intimidate an individual...because of sexual orientation;

(2) knowing the conduct constituting the offense would cause and individual...to be intimidated because of...sexual orientation...

(3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim...reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim...because of...sexual orientation... N.J. Rev. Stat. 2C-16-1.

New York:

1. A person commits a hate crime when he or she commits a specified offense and either:

(a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of or a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct. NY Penal L 485.05 (2014).

Other jurisdictions, via statutory enactment, protect and/or prohibit conduct based upon **both** sex and sexual orientation. See, Conn. Gen. Stat. Sec 46a-58; D.C. Code Sec. 22-3701; Iowa Code 729A.1; Me. Rev. Stat. tit. 5, Sec. 4684-A; Minn. Stat. Sec. 609.2231; Mo. Rev. Stat. 557.035; N.H. Rev. Stat. Ann. 651-6; R.I. Gen. Laws Sec. 12-19-38; Tex. Code Crim. Proc. Ann art. 42.104 and Vt. Stat. Ann tit. 13, Sec. 1445.

Interestingly, West Virginia's hate crime law, as codified in West Virginia Code 61-6-21 limits protection solely to the class of sex and does not include sexual orientation. In summary, "hate crime," statutes in certain jurisdictions cover sexual orientation solely; other jurisdictions cover both sexual orientation and sex. West Virginia Code 61-6-21 covers only sex.

The precedential effect of the above referenced statutory citations is apparent as they conclusively establish that "sex" and "sexual orientation" are

considered and are treated as separate and distinct categories or protected classes and are not one in the same.

The West Virginia legislature, in enacting West Virginia Code 61-6-21(b), certainly had the option to include sexual orientation as an area of protection but chose not to do so. This omission, standing alone, establishes the legislative intent was to exclude sexual orientation and, therefore, the State of West Virginia's attempt to circumvent said legislative intent and charge Mr. Butler with violating this statutory provision is inappropriate.

In enacting West Virginia Code 61-6-21(b), the West Virginia legislature could have included sexual orientation as an area of protection; the legislature could have amended the law to include protection based on sexual orientation during any of its sessions, especially considering the fact West Virginia Code 61-6-21 was enacted in 1987, almost thirty (30) years ago. The solution to this issue is and has been very simple. However, such oversight should not prejudice Steward Butler.

**THE LOWER COURT DID NOT COMMIT ERROR BY ENTRY OF ITS ORDER  
DISMISSING COUNTS I AND III OF THE INDICTMENT**

The Petitioner/Appellant herein argues that the lower court committed error in its handling of the Certified Question and further by entry of its Order prospectively dismissing Counts I and III of Indictment #: 15-F-242. The Petitioner's arguments are without merit.

Specifically, Petitioner/Appellant contends that the lower court improperly sought certification pursuant to West Virginia Code 51-1A-1 and the proper statutory provision is West Virginia Code 58-5-2.



Petitioner is correct that two separate and distinct statutory provisions exist for addressing certified questions to this court. Generally, West Virginia Code 51-1A-1 addresses the procedure to be utilized by foreign courts as a means for answering questions of West Virginia law. West Virginia Code 58-5-2 provides for appellate review by the Supreme Court of Appeals of West Virginia for questions of law pending in circuit courts.

Dispositive of this issue is Petitioner's failure to make any objection to the lower court's certification to this court in addition to Petitioner's agreement that the issue herein is one of first impression which requires a judicial interpretation of the applicable statutory provision and Petitioner's continued participation, without objection, to that process.

Specifically, the procedural history of this case indicates that the parties were in agreement this matter would be appropriate to seek certification to this court regarding interpretation of West Virginia Code 61-6-21. In that regard, a Status Conference was held on 29 September 2015. The lower court directed and the parties agreed to draft, for the lower court's consideration, a certified question for submission to this court. The parties complied with the lower court's directive and the Order of Certification was submitted to this court on 16 December 2015. This court issued an Order Denying Certification on 09 February 2016. As such, the issue of certification was moot at this point.

Thereafter, another Status Conference was conducted on 29 February 2016 at which time a Scheduling Order was agreed upon, again without any objection from the Petitioner, relating to the submissions of briefs addressing

the issue of the applicability of West Virginia Code 61-6-21(b). The Scheduling Order, thereafter, was amended by the lower court. The parties then filed their respective briefs after which the lower court, by Order dated 13 May 2016 ruled that it could not expand the word “sex” to include “sexual orientation,” within the purview of West Virginia Code 61-6-21(b) and, therefore, the State of West Virginia could not properly charge Mr. Butler with a “hate crimes,” violation. Significantly, however, the lower court stayed imposition of its Order for a period of sixty (60) days to permit the State of West Virginia to appeal its final Order. It is from this very Order that the present appeal is taken.

As such, the appellee herein contends that Petitioner’s argument is moot. Alternatively, Petitioner’s argument is without merit as the State of West Virginia not only did not object to the lower court’s handling of the certified question submission but actually agreed to the same. Finally, the lower court stayed its Order for a period of sixty (60) days to permit the instant appeal to be filed. As the appeal was filed and shall be now be considered by this Court, the Indictment against Mr. Butler remains active pending a ruling by this Court upon the issues presented herein.

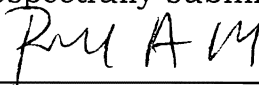
### **CONCLUSION**

The primary issue before this court is whether the term “sex” as embodied in West Virginia Code 61-6-21 can be expanded to include protection for “sexual orientation.” As the foregoing discussion and argument establishes, the answer to that question must be answered in the negative.

In interpreting a statute, words are given their common meanings. The phrases “sex” and “sexual orientation,” have separate and distinct definitions. The statutory language of West Virginia Code 61-6-21 is clear and not ambiguous. Numerous other jurisdictions have enacted similar statutes and have chosen to specifically include “sexual orientation,” as a protected class. West Virginia Code 61-6-21 fails to do although the legislature could have originally included such language or amended the statute to include the same. Finally, as this is a penal statute it must be interpreted and strictly construed against the State of West Virginia and in favor of Mr. Butler. Applying the foregoing principles to the case at bar, the lower court properly interpreted and applied to applicable statutory provisions and Mr. Butler now asks this Honorable Court to affirm the same.

The Respondent/Appellee further contends that the lower court did not commit error in its handling of the certified question. As stated, the State of West Virginia failed to make any objection(s) to the lower court’s handling of the certified question and in fact agreed, throughout the proceedings in the lower court. As this court declined to docket the certified question this issue is now moot. However, in the alternative the lower court has stayed imposition of its Order pending a ruling by this Court. Accordingly, the State of West Virginia has not been prejudiced by the lower court’s ruling.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ray A. Nolan", is written over a horizontal line.

Raymond A. Nolan, Esquire (#6229)

## CERTIFICATE OF SERVICE

I, Raymond A. Nolan, counsel for the Respondent/Appellee, Steward Butler do hereby certify that I have served the foregoing **Response Brief Of The Appellee Steward Butler** upon the following this day by depositing true and correct copies in the United States mail addressed to:

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Dated this 10<sup>th</sup> day of November, 2016.



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Raymond A. Nolan, Esquire (#6229)